Badrul Zaman bin PS Md Zakariah v Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–21–01 OF 2001
KAMALANATHAN RATNAM J
9 APRIL 2001

Civil Procedure *— Judgment — Setting aside — Failure to file defence — Irregular judgment — Whether plaintiff could obtain final judgment on quantified general damages — Whether judgment should be set aside*

The plaintiff sued the defendants in defamation, and prayed for general, exemplary and special damages, an injunction, costs and interests. The plaintiff then effected service against the defendants who entered appearance. The first three defendants obtained an extension of time to file the defence, but the fourth defendant ('the defendant') did not do so. The defendant later applied by way of an ex parte application to stay execution on the judgment until its application to set aside the judgment in default had been heard. The court granted an order in terms of the ex parte application and fixed the hearing of the inter partes application. It was submitted that the judgment was irregular as the prayers for damages was for general damages although quantified at RM100m.

Held, setting aside the judgment with costs to the defendant:

(1) The court agreed with the defendant that the words 'debt or liquidated demand' do not extend to unliquidated damages even if that amount of damages is pleaded as a definite figure (see p 126G); *Seok Mee Seong v Abdul Wahab bin Abdul Rahman* [1989] 1 MLJ 193 followed. Therefore the judgment in default of defence as entered was clearly irregular and ought to be set aside ex debito justitiae (see p 126G).

(2) The judgment was clearly in the form of a final judgment as it had abandoned all other prayers and had brought finality to the proceedings between the plaintiff and the defendant. The plaintiff could not have obtained a final judgment on a prayer for unliquidated damages. In fact, even the prayer for special or liquidated or ascertained damages had been abandoned in this final judgment. The plaintiff's remedy was to act pursuant to O 19 r 3 of the Rules of the High Court 1980 whereby he ought to have only obtained interlocutory judgment against the defendant with damages to be assessed and for costs (see p 127C–D).

(3) Since no defence was filed, the plaintiff ought to have filed Form 36, thus indicating his intention to abandon the claim for an injunction and in which case he could have proceeded pursuant to O 19 r 3. The court was satisfied that the final judgment obtained

by the plaintiff as against the defendant was indeed an irregular judgment (see p 128A–B).

(4) Since it was the defendant who had by default of filing the defence on time precipitated the subsequent flow of events, the said defendant ought to pay the plaintiff the costs of this application (see p 128D–E).

[**Bahasa Malaysia summary**

Plaintiff mendakwa defendan-defendan kerana fitnah, dan menuntut gantirugi am, teladan dan khas, satu injunksi, kos dan faedah. Plaintif kemudiannya melaksanakan penyampaian terhadap defendan-defendan yang memasuki kehadiran. Tiga defendan pertama telah mendapatkan satu lanjutan masa untuk memfailkan pembelaan, tetapi defendan keempat ('defendan tersebut') tidak berbuat demikian. Defendan kemudiannya memohon melalui satu permohonan ex parte untuk penangguhan pelaksanaan penghakiman tersebut sehingga permohonannya untuk mengetepikan penghakiman ingkar tersebut telah dibicarakan. Mahkamah memerintahkan satu perintah seperti dipohon bagi permohonan ex parte tersebut dan menetapkan perbicaraan permohonan inter partes tersebut. Adalah dihujahkan bahawa penghakiman tersebut adalah di luar aturan kerana tuntutan gantirugi tersebut adalah untuk gantirugi am walaupun dinyatakan kuantitinya pada RM100 juta.

Diputuskan, mengetepikan penghakiman tersebut dengan kos kepada defendan:

(1) Mahkamah bersetuju dengan defendan bahawa perkataan-perkataan 'hutang atau tuntutan jumlah tertentu' tidak merangkumi gantirugi yang belum ditentukan walaupun jumlah gantirugi dituntut sebagai satu jumlah yang tetap (lihat ms 126G); *Seok Mee Seong v Abdul Wahab bin Abdul Rahman* [1989] 1 MLJ 193 diikut. Oleh itu penghakiman ingkar pembelaan yang dimasukkan itu jelas di luar aturan dan patut diketepikan ex debito justitiae (lihat ms 126G).

(2) Penghakiman tersebut dengan jelas berbentuk satu penghakiman akhir kerana ia telah meninggalkan semua tuntutan yang lain dan memberi kemuktamadan kepada prosiding antara plaintif dan defendan. Plaintif tidak mungkin mendapat penghakiman akhir bagi satu tuntutan gantirugi yang belum ditentukan. Malah, tuntutan untuk gantirugi khas atau gantirugi yang ditentukan juga ditinggalkan dari penghakiman ingkar ini. Remedi plaintif adalah berdasarkan A 19 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 di mana beliau seharusnya hanya mendapatkan penghakiman interlokutori terhadap defendan dengan gantirugi untuk dinilaikan dan dengan kos (lihat ms 127C–D).

(3) Oleh kerana tiada pembelaan difailkan, plaintif sepatutnya memfailkan Borang 36, dengan itu menunjukkan niatnya untuk meninggalkan tuntutan untuk satu injunksi dan dalam keadaan ini boleh meneruskan tindakan berdasarkan A 19 k 3. Mahkamah berpuas hati bahawa penghakiman akhir yang diperolehi oleh plaintif terhadap defendan memang merupakan satu penghakiman luar aturan (lihat ms 128A–B).

(4) Memandangkan defendan yang telah gagal untuk memfailkan pembelaan tepat pada masa yang telah mengakibatkan kejadian-kejadian yang seterusnya, defendan sepatutnya membayar plaintif kos permohonan ini (lihat ms 128D–E).]

Notes

For cases on setting aside of judgment generally, see 2 (2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2645–2715.

Cases referred to

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Seok Mee Seong v Abdul Wahab bin Abdul Rahman [1989] 1 MLJ 193 (folld)

Legislation referred to

Rules of the High Court 1980 O 19 rr 2, 3, 4, 5, 7, O 21 r 2(1)

Badrul Zaman bin PS Md Zakariah in person.

Paul Subramaniam (*T Thavarajah* with him) (*Zaid Ibrahim & Co*) for the fourth defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff sued the defendants in defamation. For the purpose of the present proceedings, there is no need for me to go into details of the plaintiff's claim except to state that the plaintiff prayed for:

(1) general damages which he quantified at RM100m as against each of the defendants;

(2) exemplary damages;

(3) special damages;

(4) an injunction restraining the defendants or their agents from repeating the libel against the plaintiff;

(5) costs; and

(6) interests.

The plaintiff then effected service as against each of the defendants who entered appearance. Whilst the first three defendants represented by the Attorney General's Chambers wrote to the plaintiff and obtained an extension of time to file the defence, the fourth defendant ('the defendant') did not do so. On 23 February 2001, the plaintiff entered judgment against the defendant for RM100m with interest at 8% and costs.

On 26 February 2001, the defendant applied by way of an ex parte application to stay execution on the judgment dated 23 February 2001 until the defendant's application to set aside the said in default judgment was heard, and also prayed that costs be in the cause. I granted an order in terms of the ex parte application and fixed the hearing of the inter partes application to 7 March 2001.

In the meantime, by way of encl 10, the defendant applied to set aside the in default judgment dated 23 February 2001. Enclosure 10 was fixed for hearing inter partes on 8 March 2001. As the plaintiff was unrepresented, I enquired if he wished to file any affidavit in reply and if not, whether he was prepared to respond. He indicated that he was ready to respond. I then informed the plaintiff that since he did not have the benefit of counsel I would explain to him in simple language any argument of the defendants that he did not understand. After each argument, I asked the plaintiff if he understood and he indicated that he did. Indeed the plaintiff came prepared with a written submission to which he frequently referred to, but which he did not tender to court. The defendant tendered a skeletal submission.

Findings of the court

It was the defendant's contention that the judgment entered by the learned senior assistant registrar ('the SAR') was irregular. Referring to the judgment itself, the defendant argued that it was in fact in the form of a final judgment for R100m with interests at 8% from the date of the said judgment and costs. Again referring to the reliefs prayed for, which I had enumerated earlier in my judgment, the defendant pointed out that the prayers for damages were for general damages. In fact, I note that whilst there was a prayer for special damages, the same was not quantified. Referring to *Seok Mee Seong v Abdul Wahab bin Abdul Rahman* [1989] 1 MLJ 193, the defendant argued that the words 'debt or liquidated demand' do not extend to unliquidated damages even if that amount of damages is pleaded as a definite figure. I agree. To my mind, the judgment in default of defence as entered is clearly irregular and ought to be set aside ex debito justitiae.

The recourse of the plaintiff when a defendant fails to file his defence against a claim for liquidated damages is to act pursuant to O 19 r 2 of the Rules of the High Court 1980 ('the RHC'). The said rule reads as follows:

> 2 (1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the

writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

(2) Order 13 r 1(2) shall apply for the purposes of this rule as it applies for the purposes of that rule.

In respect of a claim for unliquidated damages, the plaintiff must act pursuant to O 19 r 3 of the RHC which reads as follows:

> Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

The judgment obtained on 23 February 2001 is clearly in the form of a final judgment as it has abandoned all other prayers and has brought finality to the proceedings between the plaintiff and the defendant. The plaintiff could not have obtained a final judgment on a prayer for unliquidated damages. In fact, even the prayer for special or liquidated or ascertained damages as they are interchangeably called, has been abandoned in this final judgment. The plaintiff's remedy was pursuant to O 19 r 3 of the RHC whereby he ought to have only obtained interlocutory judgment against the defendant with damages to be assessed and for costs.

But Mr Paul Subramaniam argued that even O 19 r 3 of the RHC is not available to the plaintiff because of the prayer for an injunction claimed by the plaintiff as against all the defendants. Counsel referred me to O 19 r 7(1) of the RHC which reads as follows:

> (1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rr 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under the rules for service of the defence, apply to the court for judgment, and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

Whilst O 19 r 2 of the RHC deals with liquidated claims and r 3 deals with unliquidated claims, r 4 deals with a claim in detinue and r 5 deals with a claim for possession of immovable property. Since a claim for an injunction does not fall within any of these rules, clearly r 7(1) must apply. In such a case the plaintiff ought to have, after the expiration of the period fixed for filing the defence, applied to the court by summons or motion pursuant to O 19 r 7(3) of the RHC for judgment. On the date fixed for the hearing of that application the court, after hearing the plaintiff and possibly the defendant, would then give such judgment that the court deems that the plaintiff is actually entitled to. The plaintiff could have bypassed O 19 r 7(1) of the RHC if he had shown to the satisfaction of the court that he had withdrawn the claim for an injunction. This he can do pursuant to O 21 r 2(1) of the RHC which reads as follows:

> (1) The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by

> him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

Since no defence was filed, the plaintiff ought to have filed Form 36, thus indicating his intention to abandon the claim for an injunction and in which case he could have proceeded pursuant to O 19 r 3 of the RHC.

I am satisfied that the final judgment obtained by the plaintiff as against the fourth defendant on 23 February 2001 was indeed an irregular judgment. In *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 the Court of Appeal expressed its views in no uncertain terms as to what ought to be done to a judgment obtained irregularly. This is what the court said at p 469:

> … the default judgment taken by the respondent is an irregular judgment and ought not to be allowed to subsist. That being the case, the appellant is entitled to have it set aside *ex debito justitiae*.

I therefore set aside the judgment. With regard to costs, the plaintiff submitted that had the defendant applied to him he would have granted an extension of time to file the defence. In fact, the Attorney General on behalf of the other defendants, did write to him for an extension of time, and he granted the extension. I therefore was of the view that since it was the defendant who had by default of filing the defence on time, precipitated the subsequent flow of events, the said defendant ought to pay the plaintiff the costs of this application. I then directed the defendant to file its defence within ten days from the date of my order.

Judgment set aside. Defendant to pay the plaintiff the costs of this application.

Reported by Wong Ee Lynn